

Texas Department of Health Procedures

For The

Complaint Resolution Process

- **Mediation**
- **Complaints Alleging Discrimination
(Discrimination Complaints)**
- **Complaints Not Alleging Discrimination
(Non-Discrimination Complaints)**

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MEDIATION

General Information About Mediation

Mediation is a meeting or series of meetings in which a neutral third party (generally from outside the employee's TDH organizational area), called a mediator, helps the parties' involved come to an agreement, based on both party's needs and interests. Mediation helps primarily by opening communication between the parties in dispute and by coming up with options. It allows more informal problem solving between parties directly involved in a dispute. The mediator will not arbitrate or decide an issue that is in dispute and will not problem solve for the parties. Mediators used in this program will be TDH employees who have completed training that meets the standard of the 1987 Texas Alternative Dispute Resolution Act, Chapter 154, Texas Civil Practice and Remedies Code.

Mediation is completely voluntary for all parties involved, improving the likelihood that the resulting agreement will be acceptable to the parties. It offers the advantage of informality and reduced time and expense to resolve disputes. In mediation, the mediator can meet with the parties jointly (this is preferred) or separately (if necessary), in what is called a caucus, to help them reach an agreement. Mediation offers advantages such as:

- Provides the opportunity for both sides to tell their story.
- Helps reduce feelings of hostility.
- Helps separate emotional issues from factual issues.
- Promotes discussion of creative solutions.
- Helps people work things out themselves.
- Offers an opportunity for a solution that is good for the employee and TDH.

It is intended that a mediation conducted within TDH be cost-free to the parties. A party making a request that results in a unique expense being incurred must bear that added cost.

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- The employee(s) requesting mediation notifies the Ombudsman. If the parties involved agree to participate in mediation, the Ombudsman will notify the appropriate TDH managers and serve as the mediator or coordinate the request for the services of a trained mediator.
- After a mediator has been determined the mediator sets up the meeting and ensures that all parties are notified. If possible, the meeting should be held within 10 calendar days of the Ombudsman's receipt of the request for mediation.
- If possible, the mediator will provide five-calendar day's notice before meeting with the parties.

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- Each party will present their statement of issues at the mediation. The mediator will guide their discussion and help them in working out their differences. If necessary, the mediator can meet privately with each party to try to develop a better understanding of the problem. Each party is responsible for providing all information reasonably required for the mediator to understand the issues presented.
- Each party is responsible for expenses incurred by his/her witnesses and/or legal representation (if used).
- The TDH manager in the mediation may negotiate and sign an agreement only within the authority vested in the position he/she holds within TDH. (NOTE: A TDH manager representing TDH in mediation can request legal assistance from the Office of General Counsel. If the other party in such a mediation has legal representation, then the TDH manager must request legal assistance from the Office of General Counsel.)
- At the conclusion of a successful mediation, the parties will document an agreement. Each party and the mediator will sign this agreement. Each party and Ombudsman will be given a copy of the final agreement. The Ombudsman's copy will be the document of record and retained in accordance with the state records retention schedule.

Termination of Mediation

The mediator or either party can terminate mediation by providing written or verbal notice to that effect. An employee wishing to terminate mediation must contact the mediator who will in turn contact other appropriate parties.

Confidentiality

Mediation sessions are private and other persons may attend only with permission of the parties and the mediator. The final agreement will be the only written record of the mediation process and will be maintained in a confidential manner to the extent allowed by law.

Mediation Agreements

It is a violation of TDH policy for the parties to fail to meet the terms of the final agreement.

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COMPLAINTS OF ALLEGED DISCRIMINATION--INCLUDING SEXUAL HARASSMENT (DISCRIMINATION COMPLAINTS)

A complaint of discrimination can be filed by an employee due to alleged discrimination or harassment based on race, color, religion, gender, age, disability, national origin, sexual orientation, veteran's status, in retaliation for complaining of or opposing such discrimination, or other violations of employment law, including retaliation under the Whistleblower Act. This process is also available for complaints of sexual harassment, which is a form of sex discrimination. The employee may file a complaint or otherwise inform his/her supervisor or the Office of the Ombudsman. Nothing in this complaint procedure should be construed to limit or waive any right an employee may have under state or federal law.

An employee may contact the Office of the Ombudsman for information about the procedures for filing a complaint of discrimination. The address and telephone number for requesting this information is: Texas Department of Health, Office of the Ombudsman, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7627. Employees may also contact the Office of the Ombudsman toll-free by dialing 1-888-388-6332 (TDD: 1-877-432-7232 or Texas Relay: 1-800-735-2988 (voice)/ 1-800-735-2989 (TTY)).

The Ombudsman will determine if a complaint meets the requirements to establish jurisdiction for the complaint to be resolved within the scope of this internal process. The Ombudsman can administratively dismiss a complaint based on the following reasons:

- Timeliness - the complaint is filed beyond the established time frames.
- Lack of Basis - the complaint lacks a basis that establishes jurisdiction for filing.
- Lack of Issue/Harm - the complaint lacks an issue or harm that establishes jurisdiction for filing.
- Failure to Identify a Valid Violator/Violation Relationship - the complainant fails to establish that the alleged violator is responsible for the violation alleged in the complaint.
- Lack of Cooperation - the complainant fails to respond in a timely manner to correspondence or telephone contacts with the Ombudsman.
- Negotiated No-Fault Settlement or Mediation Agreement - the complainant and respondent agree to terms and conditions and sign an agreement upon which the complainant agrees to withdraw his/her complaint.
- Full remedy – if full remedy is offered to the complainant and is rejected.

The Ombudsman will be an objective, third party neutral fact finder throughout the complaint process. If the Ombudsman believes he/she will be unable to fairly investigate a complaint because of a bias or prejudice against either the complainant or the respondent, the Ombudsman will ask his/her supervisor for reassignment of the complaint.

Eligibility to File a Complaint of Alleged Discrimination

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The following employees are eligible to file a complaint of discrimination according to this policy:

- Any employee who believes that he/she has been discriminated against based on race, color, religion, gender, disability, national origin, sexual orientation, or veteran's status; or,
- Any employee age 40 or above who believes that he/she has been discriminated against based on age; or,
- Any employee who believes that he/she has been discriminated against based on gender in the payment of wages; or,
- Any employee who believes that she has been discriminated against based on gender because of pregnancy, childbirth, or related medical conditions; or,
- Any employee who believes that he/she has suffered retaliation for filing or participating in a complaint under the civil rights laws, for filing a worker's compensation claim, or for reporting a violation of law; or,
- Any employee who believes that he/she has been sexually harassed.

Initially, in order for an employee to file a complaint of alleged discrimination, all that must be articulated is a belief or perception that disparate treatment or adverse impact was based upon a protected category (race, color, religion, gender, age, disability, national origin, sexual orientation or veteran's status). Then the respondent will be given the opportunity to provide a legitimate, nondiscriminatory reason for the alleged action. For the purpose of this process, the respondent is the TDH employee assigned the responsibility of providing information or otherwise addressing the issues in a complaint.

Alleged Retaliation, Intimidation, Threats and/or Coercion

An employee may file a complaint of discrimination if he/she alleges retaliation, intimidation, threats, coercion and/or discriminatory conduct because the employee has either taken action or participated in an action protected by federal and state anti-discriminatory statutes or TDH's internal policies and procedures relating to the Office of the Ombudsman. Filing a complaint, however, offers no special protection to an employee who has violated agency policies or has unsatisfactory work performance.

Submittal of a Complaint of Alleged Discrimination

A complaint of discrimination should be submitted in writing to the Office of the Ombudsman in accordance with time frames stated in policy, be signed by the complainant, and contain the following information:

- The full name, work address and home address of the employee submitting the complaint;
- The organizational area from which the complaint arose;
- A concise statement of the facts of the complaint to include the identity of the person(s) alleged to have discriminated against the employee; and,
- The remedy/solution sought by the employee submitting the complaint.

Form AP-36 should be used for this purpose.

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If an employee appears in person or calls the Office of the Ombudsman to file a complaint of discrimination, he/she will be assisted and asked if the employee has discussed the concern(s) with management.

If the Office of the Ombudsman receives an anonymous letter or informational correspondence that alleges discrimination under the Office of the Ombudsman's jurisdiction, the Ombudsman will contact the appropriate authority in the Associateship/Region/Hospital to discuss the appropriate processing of the correspondence.

Review of the Complaint Alleging Discrimination:

The Ombudsman will examine the allegations made in a complaint alleging discrimination to decide if it is eligible to be filed under these procedures. If incomplete information is submitted, the Ombudsman will notify the complainant in writing of the following:

- The date of receipt of the complaint;
- The additional information needed and the fact that it must be submitted to the Ombudsman within 7 calendar days of notification; and
- The name, address and telephone number of the Ombudsman.

If complete information is submitted, the Ombudsman will conduct a preliminary review of the allegations and may request information from the parties involved. The Ombudsman will notify the complainant in writing of the following within 20 calendar days:

- The Office of the Ombudsman's jurisdiction or lack of jurisdiction regarding the complaint;
- The acceptance or rejection of the completed complaint. If appropriate, a brief explanation of why the Ombudsman cannot investigate the complaint;
- If the Office of the Ombudsman does not have jurisdiction, a referral of the complaint to another agency or an explanation of why the complaint cannot be referred. If appropriate, the letter should contain the name and address of the other agency and, if known, the name of the responsible official; and,
- The prohibition of threatening, coercive, intimidating or retaliatory acts against a person for filing complaints or providing information as part of an investigation.

Expedited Time Frames

Generally, the Ombudsman will handle complaints of discrimination on a "first-come, first-serve" basis. But a respondent will be asked to respond on a priority basis to all complaints that allege situations or circumstances based on sexual harassment, retaliation, intimidation or other types of harassment. The Ombudsman will determine on a case-by-case basis whether the allegations in a complaint require priority handling.

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Respondent's Responsibility and Time Frames:

The Ombudsman will send a notice to the respondent within 20 calendar days of receipt of the signed Form AP-36. The notice will include a copy of the complaint alleging discrimination and a request for information. The respondent has 15 calendar days from receipt of the Request for Information to submit the requested information. The Office of the Ombudsman may approve an extension based on good faith effort. If the respondent is unable to show that a good faith effort was made to submit the requested documentation within the prescribed schedule, the respondent will be notified in writing that failure to submit the data will be construed as a denial of access. Failure to submit the data by a specified date may result in the matter being referred to the Office of the Commissioner.

NOTE: The above stated time frames may be delayed if an individual has filed a complaint but he/she and the appropriate TDH managers are working to resolve the issues and the Ombudsman believes the parties can resolve the matter voluntarily. In that case, the Ombudsman will allow a negotiation period of 10 calendar days. The Ombudsman's decision must be documented in the complaint file.

Investigation of a Complaint Alleging Discrimination:

The investigation of a complaint alleging discrimination will be completed within 90 days of receipt of the complaint or will be handled in an abbreviated manner as determined on a case-by-case basis.

Withdrawal of a Complaint of Alleged Discrimination

To withdraw a complaint of discrimination, the complainant must submit a written request to the Office of the Ombudsman. This request must state the reason(s) for withdrawal. The Ombudsman will accept the request for withdrawal and administratively dismiss the case without taking any further action(s) on the matter unless the Ombudsman determines that the complainant was coerced, harassed, or compelled to withdraw the complaint. Then, the Ombudsman will reject the request for withdrawal.

Resolution of a Complaint of Alleged Discrimination - Negotiated No-Fault Settlement Agreement

At any time during the complaint process, a complainant and respondent may negotiate terms and conditions agreeable to both parties. The parties may choose to negotiate a binding agreement with standard language designed to ensure closure of the case, along with the specific terms and conditions of the agreed upon promises.

The Ombudsman will maintain neutrality during settlement negotiations and discussions and will assist the complainant and respondent in seeking a resolution. Both parties may consider any reasonable compromise or counterproposal to remedy the complaint.

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When an agreement is reached, the complainant will agree to release and forever discharge the Texas Department of Health, its officers, employees, and agents from all actions, and causes of action, suits, controversies, agreements, promises, damages, judgments, awards, executions, claims, and demands in law or in equity regarding the complaint of discrimination.

The Ombudsman and the Office of General Counsel will review a negotiated no-fault settlement agreement prior to signatures to ensure that it does not include prohibited provisions, such as waiving the complainant's future rights to file a complaint or other language contrary to law, regulations, or internal policies and procedures.

The Office of General Counsel or the Ombudsman will secure the appropriate signatures for implementing the terms and conditions of the negotiated no-fault settlement agreement. A copy of the final signed agreement, along with any pertinent supporting documentation, must be provided to the Ombudsman.

Complainant Represented by Legal Counsel

If the complainant produces a letter of representation from legal counsel, the Ombudsman will correspond with the complainant through the Office of General Counsel and the complainant's attorney of record. The complaint file will be forwarded to the Office of General Counsel, upon request by the General Counsel. The Office of General Counsel will secure the appropriate signatures for implementing the terms and conditions of a negotiated no-fault settlement agreement if the complainant secures legal counsel.

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COMPLAINTS OF ALLEGED DISCRIMINATION FILED OUTSIDE TDH

Office of the Ombudsman Responsibilities

The Office of the Ombudsman will act as the TDH contact point when an employee or applicant files an employment discrimination complaint with external investigative federal and state agencies, the Equal Employment Opportunity Commission and the Texas Commission on Human Rights. The Director, Office of the Ombudsman has been appointed as the contact person to receive all correspondence relating to these types of complaints. All complaints of alleged discrimination will be immediately forwarded to the Director, Office of the Ombudsman.

Responding to External Complaints of Alleged Discrimination

The Director, Office of the Ombudsman or his/her designee will forward a copy of a complaint of alleged discrimination from a federal or state agency to the appropriate senior manager (Associate Commissioner/Regional Director/Healthcare Facility Director or above) and the Office of General Counsel.

When the Director, Office of the Ombudsman or his/her designee receives correspondence from these external agencies requesting additional information, witness statements or other documentation, the Request for Information will be forwarded to the appropriate senior manager for immediate action. The Office of the Ombudsman will send a copy of the request to the Office of General Counsel.

TDH Representative at TCHR/EEOC Mediations

A TDH representative in mediations conducted by the Texas Commission for Human Rights (TCHR)/Equal Employment Opportunity Commission (EEOC) will be guided by the following rules. He/she may:

- Negotiate and sign a settlement agreement within the authority vested in the position he/she currently holds within TDH.
- Negotiate and sign a settlement agreement within the additional authority provided by his/her superiors or the Commissioner of Health.
- Not sign any settlement agreement outside the authority granted.
- Negotiate a tentative settlement agreement to be reviewed by appropriate staff in the program, the Office of the Ombudsman, the Office of General Counsel and the Bureau of Human Resources. The Commissioner of Health, the Office of the Attorney General and the Office of the Governor must review agreements that involve compensation or payments for judgments and settlements.

Tentative agreements must be reviewed and approved or denied within 7 calendar days from the mediation date. Denied tentative settlement agreements will be subject to the rules and regulations of the external agencies.

An attorney from the Office of General Counsel will be assigned to assist a TDH representative in such mediation.

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If a mediation session or other efforts produce a negotiated no-fault settlement agreement between the parties through the Office of General Counsel, then all final documentation on the matter will be forwarded to the Director, Office of the Ombudsman or his/her designee.

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COMPLAINTS NOT ALLEGING DISCRIMINATION (NON-DISCRIMINATION)

The complaint process also provides employees with a way to report an alleged misinterpretation or misapplication of TDH policies and/or procedures that adversely affects an employee. An employee who thinks he/she has been affected in this manner is eligible to file a complaint in accordance with this policy.

Submittal of a Complaint NOT Alleging Discrimination

- An employee must file the complaint within the time frames set in policy. To submit the complaint an employee must complete and sign Form AP-36.

To initiate the complaint the employee filing the complaint submits Form-36 to the Ombudsman. The Ombudsman will conduct a preliminary review of the allegations and may request information from the parties involved.

Resolution of a Complaint NOT Alleging Discrimination

The Ombudsman will ensure that the complaint is submitted to the appropriate supervisor(s)/manager(s) for the necessary action.

The supervisor to whom the complaint is submitted and that supervisor's supervisor need to have a clear understanding of the policy or procedure alleged to have been misinterpreted or misapplied. They are jointly responsible for ensuring that the following action is taken within 30 calendar days of their receipt of Form AP-36:

- Meeting with the employee who filed the complaint to review the allegations and to assure him/her that action will be taken to investigate the issue(s);
- Investigating the matter with assistance from appropriate TDH staff, if necessary;
- Reaching consensus on how the complaint will be resolved;
- Ensuring senior management (Associate Commissioner/Regional Director/Healthcare Facility Director or above) concurs with the resolution; and
- Providing a written reply to the employee on Form AP-39" and privately meeting with the employee to discuss the resolution.

After completing the above action, the supervisor's supervisor is responsible for ensuring that a copy of the completed Form AP-39" and all documentation gathered throughout the process is sent to the Office of the Ombudsman for retention.

The non-discrimination complaint process concludes with review and concurrence by senior management followed by issuance of Form AP-39 to the complainant. Upon issuance to the complainant of the completed Form AP-39, the process is final. Since the TDH complaint process is an internal process, final actions are not subject to appeal and employees may not file multiple complaints on the same set of facts.

Withdrawal of a Complaint NOT Alleging Discrimination

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An employee may withdraw his/her non-discrimination complaint any time during the process by providing a written notice of withdrawal to the supervisor investigating the complaint. The employee is also responsible for sending a copy of the withdrawal notice to the Ombudsman.

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Guidelines to Assist a Manager/Supervisor Investigating an Employee Complaint NOT Alleging Discrimination

- All matters relating to the investigation of the complaint must be free of bias or subjectivity and the process must be independent, impartial, and objective. This will be a key factor in gaining the trust of the employee and witnesses and will enhance the probability of acceptance of the investigation regardless of the outcome.
- Review the complaint to ensure that it contains information identifying how the employee who filed the complaint was adversely affected by the misinterpretation/misapplication of TDH policy/procedure within the time frame set in policy.
- Review the complaint resolution policy in Section 800 of the TDH Personnel Manual and any other policies that relate to the issues of the complaint.
- Develop an impartial investigative plan. This includes such things as: identifying witnesses to interview (generally this includes interviewing the person against whom the complaint is filed); developing questions to ask witnesses; determining what documents will need to be reviewed and/or collected; determining the need for additional resources; developing time frames to comply with TDH policy.
- Interview the witnesses in a confidential manner as soon as possible. The following suggestions have been used by experienced investigators in various situations:
 - Prepare for the interview and know what questions you will ask. Ask simple, short, brief open-ended questions that require a narrative answer. Avoid asking questions that can be answered with “yes” or “no” unless it is necessary.
 - Choose the best time and place for the interview.
 - Use a comfortable place with no or few distractions.
 - Only necessary persons should be at the interview. If others are required to be present, only the witness should be allowed to answer questions.
 - Develop rapport and take your time during the interviews.
 - State the purpose of the interview and never lie to the witness.
 - Discuss the TDH policy prohibiting retaliation before starting the interview.
 - Be a good listener.
 - Never talk too much or imply an answer to a question.
 - Get the witness to start talking and keep him/her talking.
 - Guide the witness conversation into proper channels – you need facts.
 - Try to get the witness to corroborate his/her own statements.
 - Be tactful and understanding. Don’t embarrass the witness.
 - Be sympathetic, but not sentimental.
 - Be friendly, but firm and avoid arguing with the witness.
 - Don’t volunteer all the information you have to the witness.
 - Summarize what you have heard to ensure the witness agrees with your understanding.
- Document the findings in a concise, timely, accurate and complete manner. The information should be straightforward and relevant and avoid unnecessary, obscure and confusing language. Documentation should be objective and logically organized.

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- The Office of the Ombudsman, General Counsel, and the Bureau of Human Resources are available for technical assistance.